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No. 01-1572

IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Petitioner, Cook County, Illinois ("Cook County"), respectfully submits this reply brief in further support of its petition for a writ of certiorari to review the opinion and decision of the United States Court of Appeals for the Seventh Circuit entered on January 22, 2002 in *United States ex rel. Chandler v. Cook County, Illinois*, 277 F.3d 969 (7th Cir. 2002). A reply brief is warranted because Respondent misstates the true breadth of the conflict between the circuits and raises an issue regarding the Seventh Circuit's decision that was not addressed in Cook County's petition.

I. THE PATENT AND IRRECONCILABLE CONFLICT CURRENTLY IN THE CIRCUITS IS WELL-DEFINED AND RIPE FOR RESOLUTION.

Respondent, Janet Chandler, Ph.D. ("Relator"), misstates the true breadth of the current split in the circuits. In fact, the conflict could not be more patent. As it stands today, the thousands of local governments within the Fifth and Third Circuits are not subject to the False Claims Act ("FCA"), *see United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486 (5th Cir. 2001), *cert. denied,* 122 S. Ct. 808, *rhg. denied,* 122 S. Ct. 1198 (2002); *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219 (3d Cir. 2002), *rhg. denied,* No. 00-3691 (Feb. 22, 2002), *petition for cert. filed,* No. 01-1711 (May 20, 2002), while the thousands of local governments in the Seventh Circuit are subject to the FCA and its attendant punitive damages and statutory fines. This disparity in the application of the FCA to local governments throughout the United States will not change by waiting for additional circuits to consider the question presented in Cook County's petition. Regardless of how other circuits weigh in, the split is now as fundamental and deep as it will ever get: either a local government is subject to liability under the FCA or it is not.

The current split in the circuits on local governmental liability is strikingly similar to the split in the circuits when the Court granted *certiorari* in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), to decide the issue of FCA liability vis-à-vis States. There, the Second and Eighth Circuits had held that States could be sued under the FCA, while the D.C. and Fifth Circuits held that they could not. *See United States ex rel. Stevens v. Vermont Agency of Natural Resources,* 162 F.3d 195 (2d Cir. 1998) (FCA suits against States are not barred by the Eleventh Amendment and States are "persons" under the

FCA), *rev'd*, 529 U.S. 765 (2000); *United States ex rel. Zissler v. Regents of the Univ. of Minnesota,* 154 F.3d 870 (8th Cir. 1998) (States are persons under the FCA); *United States ex rel. Long v. SCS Business and Technical Inst.*, 173 F.3d 870 (D.C. Cir. 1999) (States are not persons subject to FCA suits), *cert. denied*, 530 U.S. 1202 (2000); *United States ex rel. Foulds v. Texas Tech. Univ.*, 171 F.3d 279 (5th Cir. 1999) (Eleventh Amendment bars *qui tam* actions against States), *rhg. denied*, 1999 U.S. App. LEXIS 14660 (5th Cir. June 1, 1999), *cert. denied*, 530 U.S. 1202 (2000). Consequently, there is nothing shallow about the current split in the circuits. The federal courts and local governments throughout the United States need guidance from the Court now.

II. THE SEVENTH CIRCUIT'S CONCLUSION THAT A SUABLE "PERSON" UNDER THE 1863 ENACTMENT OF THE FCA INCLUDED LOCAL GOVERNMENTS IS BASED ON A MISINTERPRETATION OF *MONELL* AND THE ORIGIN OF MUNICIPAL LIABILITY.

In her response brief, Relator insists that the Seventh Circuit's reliance on *Monell v. Department of Soc. Serv. of City of New York*, 436 U.S. 658 (1978), for its proposition that "by 1844, both private and municipal corporations were presumptively included within the meaning of 'person'" is proper. *United States ex rel. Chandler v. Cook County, Illinois*, 277 F.3d 969, 974 (7th Cir. 2002). (App. 8a.) The Seventh Circuit, however, misread the *Monell* Court's timeline regarding the inclusion of local governments as "persons" subject to suit in federal court. A proper reading of *Monell* leads to the conclusion that local governments were not considered "persons" in 1863, when the FCA was originally enacted.

In *Monell*, the Court observed that, under *Bank of the United States v. Deveaux*, 5 Cranch 61, 86 (1809), corporations were not considered "persons." *Monell*, 436 U.S. at 687. The *Deveaux* doctrine was abandoned in 1844 when the Court held, in *Louisville R. Co. v. Letson*, 2 How. 497 (1844), that a '"corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person.'" *Id.* at 687-88 (quoting *Letson*, 2 How. at 558). It was not until 1869, however, that "the *Letson* principal was automatically and without discussion extended to municipal corporations." *Id.* at 688 (citing *Cowles v. Mercer County*, 7 Wall. 118, 121 (1869)). In other words, local governments were not considered "persons" until six years after the FCA was originally enacted in 1863.

Relator's citation to *Board of Com'rs v. Aspinwall*, 65 U.S. (24 How.) 376 (1860), does not prove otherwise. *Aspinwall* merely decided that the federal court had the authority to issue a writ of *mandamus* to county commissioners to perform their duty in complying with a court order. *Aspinwall*, 65 U.S. at 384-85. The *Aspinwall* Court did not consider whether local governments were "persons" for purposes of suits in federal court, nor has Relator cited any cases that illustrate that local governments were considered "persons" subject to suit in federal court prior to the enactment of the FCA in 1863. Rather, Relator's citation to *Monell* for the proposition that "municipal corporations were routinely sued in the federal courts and this fact was well known to Members of Congress," *Monell*, 436 U.S. at 688, refers to the period after the Court decided *Cowles v. Mercer County* in 1869 and before Congress enacted Section 1983 in 1871. *See id.*

The presumption upon which the Seventh Circuit relied, that local governments are "persons" subject to suit in federal court, simply did not exist in 1863 when the FCA was enacted. Both the absence of a presumption and the context

of the enactment, which was to confront massive fraud on the federal government by *private* contractors during the Civil War, *see Stevens*, 529 U.S. at 781, with no legislative history remotely suggesting an intent to target local governments, confirm that the Seventh Circuit's entire analysis was founded on a faulty premise.

This Court should grant Cook County's petition in order to resolve the very serious conflict among the circuits that creates a disparate application of the FCA to local governments throughout the United States and to address the errors in the Seventh Circuit's analysis.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, as well as for the reasons set forth in the briefs filed by the *amici curiae*, the petition should be granted.

Respectfully submitted,

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